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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

NO. 79-6366

LARRY LYNN BLAKNEY,

Petitioner,

-vs-

STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Montana

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent State of Montana respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Montana Supreme Court's opinion in this case. That opinion is reported at 605 P.2d 1093.

REASONS WHY THE WRIT SHOULD BE DENIED

The Issues Raised by The Petitioner Are Not Sufficiently Significant To Warrant This Court's Review.

The petitioner's first contention is that he was denied due process because of the ruling by the Montana Supreme Court that it was harmless error to shift the burden of proof to petitioner at the hearing on the voluntariness of his confession. This issue does not present a substantial federal question because the ruling was confined to facts and circumstances peculiar to the petitioner's case.

In the state supreme court, the petitioner challenged the constitutionality of section 46-13-301(4) of the Montana Code Annotated. The statute provides that the burden of

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proving that a confession is involuntary is on the defendant. At the petitioner's suppression hearing, the prosecution relied on the statute and argued its applicability to the district court judge. In reviewing the proceedings against the petitioner in this case, the Montana Supreme Court explicitly declared section 46-13-301(4) unconstitutional, correctly basing its holding on this Court's decision in Lego v. Twomey, 404 U.S. 477, 489 (1972). State v. Blakney, 605 P.2d 1093, 1098 (1979). The Montana Supreme Court further specifically declared that the State is required to prove a confession voluntary by a preponderance of the evidence. Id. Because of these holdings by the state supreme court, the challenged statute and the impermissible burden of proof as to voluntariness will no longer be applied to defendants attacking their confessions in Montana courts. Any error that might have occurred on this issue in the proceedings under review affected only the particular petitioner now before the Court.

Furthermore, the Montana Supreme Court's holding that it was harmless error for the trial court to require the petitioner to carry the burden of proof as to voluntariness was based exclusively on the facts of this case. The court carefully reviewed the entire record of the suppression hearing, the procedure undertaken by the trial judge, the extensive evidence presented by both the State and the petitioner on the issue of voluntariness, and the detailed factual findings made by the lower court. Applying the test pronounced and approved by this Court in Chapman v. California, 386 U.S. 18, 24 (1967), the state supreme court then held that the impermissible burden of proof placed on the petitioner was harmless beyond a reasonable doubt. State v. Blakney, 605 P.2d at 1100. This holding of the Montana Supreme Court, premised as it was entirely on the

record and facts of the petitioner's hearing, has no impact outside the limits of this case. Therefore, certiorari should be denied on the first issue presented by the petitioner.

Likewise, the second issue raised by the petitioner, on the existence of a valid waiver of the right to counsel, is not of sufficient significance to warrant the granting of discretionary review by this Court. As a general rule, constitutional rights may be waived, so long as the waiver is made intentionally and knowingly. Brewer v. Williams, 430 U.S. 387, 403 (1977). The question of waiver, even when the right to counsel is involved, depends upon the particular facts and circumstances of the case. North Carolina v. Butler, 441 U.S. 369, 374-75 (1979). Therefore, unless this Court should rule for the first time that the right to counsel may never be waived once it has been asserted, the determination of the existence of a waiver of the right to counsel must be based solely on the facts and evidence in the individual case.

Both the district judge and the Montana Supreme Court examined and addressed the issue of whether the State had shown a waiver of the right to counsel by the petitioner. Each court determined, after a thorough review of the facts and circumstances of the case, including the petitioner's background, experience, and conduct, that he had understood his right to representation and had voluntarily waived it. State v. Blakney, 605 P.2d at 1097-98; Findings of Fact 1-9, Appendix B to Petition. These factual findings by the state courts are entitled to great weight. The petitioner here is merely seeking one more review of a question turning entirely on the facts of this case, a question that has already been resolved twice in favor of the respondent. Under these circumstances, a grant of certiorari on the petitioner's second issue is not warranted.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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